Supreme Court, U. S.
FILED
FEB 15 1980
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-1093

ROBERT S. BLY, ET AL.,

Petitioners,

vs.

DANIEL R. McLEOD, ETC., ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 605 F.2d 134 and is set out in the Appendix of the Petition at 1a.

The orders of the District Court are unreported and are set out in the Appendix of the Petition at 15a and 16a.

JURISDICTION

The Respondents do not question the Court's jurisdiction in this proceeding.

QUESTIONS PRESENTED

I.

Whether the petitioners are the prevailing party and entitled to an award of attorneys' fees against the respondents under 42 U.S.C. §§ 19731(e) and 1988 by virtue of the fact that the District Court entered a temporary restraining order against a party other than the respondents in a case which was later dismissed on the ground of mootness?

II.

Whether the petitioners are the prevailing party and entitled to an award of attorneys' fees against the respondents under 42 U.S.C. §§ 1973l(e) and 1988 by virtue of the fact that the Court of Appeals vacated and remanded an earlier order of dismissal without determining the merits of the claim, or by virtue of the fact that a three-judge court was designated to hear the claim?

III.

Whether the petitioners should be deemed the prevailing party for purposes of an award of attorneys' fees under 42 U.S.C. §§ 1973l(e) and 1988 after their claim was dismissed as moot, when the District Court made no finding that they had obtained a benefit from the respondents as a consequence of this litigation?

STATEMENT OF THE CASE

The petitioners sought to obtain absentee ballots with which to vote in the 1972 South Carolina Democratic Party primary election because they intended to be away from their residences on election day for reasons related to their employment. Their absentee ballot requests were denied because state election law at that time did not permit absentee voting by persons who were away from their residences on election day for reasons related to their employment. Therefore, on the eve of the primary election the petitioners brought suit against certain state, county, and Democratic Party officials to obtain an absentee ballot.

Two days after the commencement of the suit the petitioners obtained a temporary restraining order against the

Democratic Party defendants. 1/ The temporary restraining order enjoined the party officials from refusing to issue absentee ballots to the petitioners and further directed the party officials to count and retain those ballots separately. Infra at 2-A. The temporary restraining order expired after ten days. Id.

There was no finding by the District Court that the petitioners obtained any additional voting rights whether voluntarily or otherwise, as a consequence of this lawsuit. The attorney for the petitioners suggested to the District Court that one of the petitioners, Bly, was permitted to vote absentee in a subsequent Democratic Party primary election and run-off election while away from his residence as a "visiting scholar." Supplemental Appendix, 19, 51. At this time South

1/ The Democratic Party defendants did not make an appeal and they are not respondents herein.

Carolina election law permitted a qualified student to vote by absentee ballot. No proof was offered by the petitioner, however, and no finding of fact was made as to the reason for this petitioner's voting by absentee ballot. Furthermore, no other specific instance of absentee voting by a petitioner or a member of that class was ever found by the district court. (Supplemental Appendix 19, 51; Appendix 80, 85; see Appendix to Petition, 4a, 5a). It should be noted that the respondents' Amended Answer alleges that the petitioners voted by absentee ballot in the 1972 General Election. (Supplemental Appendix, 60). However, the District Court did not find whether they did vote, and if they did, whether they voted pursuant to existing statutory authority, as a result of error, or for any other reason. The petitioners simply did not seek a finding in the District Court as to the cause, or even the occurrence, of any subsequent

absentee voting by themselves or their class.

In 1975, the South Carolina General Assembly enacted a broad revision to its election laws, providing among other things for the extension of the absentee ballot in state elections to those persons who are absent from their county of residence on election day due to employment. 2/ Two years later the District

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2/ The amended statute added five new categories of voters who could vote by absentee ballot if they were absent from their county of residence on election day due to the following reasons:

* * *

(4) Employment.
(5) Physically disabled persons.
(6) Governmental employee, their spouses and dependents residing with them.
(7) Electors with a death or funeral in the family within a three day period prior to the election.
(8) Professions of ministry, teaching, and medical.
(9) Persons on vacation.

§ 7-15-320, S.C. CODE, 1976.

Court found that the petitioners' claim had been mooted by the revised state statute, and it awarded them attorneys fees against the state and county government defendants. The district court found that, although the petitioners did not ultimately prevail on the merits, they nonetheless prevailed for purposes of an award of attorneys' fees because they obtained the temporary restraining order described above, because the first dismissal of their claim was vacated by the Court of Appeals and remanded to allow the District Court to state its finding of fact and conclusions of law, and because a three-judge court was designated to hear this case. (Pet. 16a) The state and county government defendants appealed the award of attorneys fees. The

Fourth Circuit Court of Appeals reversed the trial court, finding among other things that the petitioners had obtained no benefit as a consequence of this litigation. (Pet. 11a) Therefore, they were not the prevailing party and they were not entitled to an award of attorneys fees.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I.

There is no conflict between the decisions of other Courts of Appeals and the decision below denying the petitioners an award of attorneys' fees against the respondents under 42 U.S.C. §§ 1973l(e) and 1988 because the petitioners obtained no appropriate relief from the respondents as a consequence of this litigation.

In the decision below, the Court of

Appeals reversed an award of attorneys fees on the ground that the petitioners were not the prevailing party. The record establishes that the petitioners' claim was dismissed on the grounds of mootness and it does not establish that they obtained any relief, voluntary or otherwise, as a remedy for any constitutional violation. Therefore, they are not entitled to an award of attorneys' fees under the subject statutes. S.Rep. No. 94-1011, 94th Cong., 2d Sess. 5 (1976); H.R.Rep. No. 94-196, 94th Cong., 1st Sess. 40, 41 (1975); see Bradley v. School Board of City of Richmond, 416 U.S. 696, 722, 40 L.Ed.2d 476, 494 (1974); see also Mills v. Electric Auto-Lite Co., 396 U.S. 375, 392, 24 L.Ed.2d 593, 606 (1970).

The petitioners argue that they are

entitled to an award of attorneys fees against the respondents because a temporary restraining order was entered against certain Democratic Party defendants who are not respondents, because an earlier order of dismissal was vacated by the Court of Appeals without deciding the merits of that appeal, and because a three judge court was empaneled to hear the petitioners' claim. The court below determined that success on these sort of procedural matters does not constitute a benefit to the petitioners which would entitle them to an award of attorneys fees. No other Court of Appeals has decided this issue differently.

a. As to the ten-day temporary restraining order entered against parties who are not respondents.

The petitioners argue specifically that the temporary restraining order conferred a benefit in that it granted them the right "to cast absentee ballots pendente lite." (Pet., 8). However that temporary restraining order was obtained against officials of the Democratic Party of South Carolina, not against any of the respondents herein. The respondents are not even named in that order. Infra at 2-A. Furthermore, the order permitted the petitioners only "to vote in the August 29, 1972 Democratic primary election...." Id. It expired by its own terms on September 3, 1972, ten days following its entry. Id. The defendant party officials were directed to keep separately and count separately any ballots cast pursuant to

the ten-day order. Id. This order was simply a provisional remedy designed to protect the rights of the plaintiffs in the event that they were to prevail in any ultimate adjudication of their claim. However, they did not prevail and the order by its own terms lapsed. The petitioners have not proven that they obtained any relief from the respondents as a consequence of this litigation. They failed to establish their claim and consequently won no injunctive relief. (Pet., 15a, 16a-22a). It should be noted that they likewise proved no voluntary relief, as set out more fully below.

Nonetheless, the petitioners urge that the decision below denying them attorneys' fees is in conflict with decisions of other circuits. In Gagne v. Maher, 594 F.2d 336 (2d Cir. 1979), cert. granted, ___U.S.___, 100 S.Ct. 44 (1979), the Court of Appeals affirmed an award of attorneys fees against the defendants because the lawsuit had been concluded by a consent decree in which the plaintiffs obtained final relief on some of their claims. Supra at 340. The relief obtained in Gagne was a consequence of the litigation. In the instant case the petitioners failed to prove that they obtained any relief as a consequence of this litigation whether by settlement or by decree.

Their claim was rendered moot by an intervening revision of the State's election laws. Thus they were properly denied an award of attorneys' fees.

Likewise, in Criterion Club of Albany v. Board of Commissioners, 594 F.2d 118 (5th Cir. 1979) the Court of Appeals determined that the plaintiff would be entitled to an award of attorneys fees if as "a consequence of the filing of this suit [the plaintiffs had obtained relief] by way of a compromise or other agreement of the parties." Supra at 120. Again in the instant case the petitioners did not establish that they obtained any relief from the respondents. Therefore, they were properly denied an award of attorneys fees against the respondents, and there is no conflict between the decision below and the

decision of the Fifth Circuit Court of Appeals.

In Nadeau v. Helgemoe, 581 F.2d 275 (1st Cir. 1978) the Court of Appeals determined that the plaintiffs may be entitled to an award of attorneys fees "...if [they] can establish that their suit was causally related to the defendants actions which improved their condition." Supra at 281. In the instant case the District Court found no action which the respondents took to improve the condition of the petitioners. Consequently this decision of the Fifth Circuit Court of Appeals presents no conflict with the decision below.

Finally, Ross v. Horn, 598 F.2d 1312 (3d Cir. 1979), presents no conflict because it deals with the causation of acts by defendants subsequent to the commencement of the lawsuit which provide relief to the plaintiffs. In the instant case, the record is silent as to the motivation for the revision of the state's election law. The petitioners did not make that an issue in the District Court. The District Court found no subsequent act taken by the respondents to provide the petitioners the relief they were seeking. The petitioners did obtain a ten-day temporary restraining order against persons who are not respondents. Later their claim was rendered moot by a revision of the state election laws which, from the record, occurred without any

involvement by the respondents. Since the petitioners failed to prove that they obtained any benefit from any of the respondents, there is no conflict between the decision below and the decisions of other Courts of Appeals.

b. As to the previous decision of the Court of Appeals vacating the previous order of dismissal.

The petitioners argue that they should be deemed the prevailing party in this litigation because in an appeal of the original dismissal of this action (Appendix, 36-39) the Court of Appeals "express[ed] no opinion on the merits," but vacated the order and remanded the case "to allow counsel to be heard for and against dismissal and to allow the District Court to state its findings of fact and conclusions of law...."

(Appendix, 46-48). They suggest that a conflict exists between Van Hoomissen v. Xerox Corp., 503 F.2d 1131 (9th Cir. 1974) and the decision below which held that the petitioners had not prevailed. In Van Hoomissen, a party petitioned the Court of Appeals for an award of attorney's fees as part of its cost in the Court of Appeals after successfully obtaining a dismissal of the appeal. Supra at 1132. The Court of Appeals awarded attorneys fees because the appellee " 'prevailed' on this interlocutory appeal." Supra at 1133.

The instant case is substantially different. Here the petitioners are not seeking an award of attorneys fees in the Court of Appeals and they are not seeking attorneys fees solely for their

efforts in that Court. Rather they are seeking a determination that they are the prevailing party in the entire litigation because the Court of Appeals, in an earlier appeal, vacated an order of dismissal and remanded the case as described above. Van Hoomissen does not even consider that question. Indeed it allows that the "prevailing party" for purposes of that appeal may not be the prevailing party in the "principal case." Supra at 1133. Consequently, there is no conflict with the decision below which found that the petitioners were not the prevailing party in this lawsuit, i.e., the "principal case," even though an earlier dismissal of their claim had been vacated and remanded by the Court of Appeals, for they obtained no benefit as

a consequence of this litigation. Gagne v. Maher, supra; Criterion Club of Albany v. Board of Commissioners, supra; Nadeau v. Helgemoe, supra; Ross v. Horn, supra.

The decision below does not conflict, even in principle, with the decisions of other Courts of Appeals. Actually the decision below conforms with the decisions of other circuits insofar as it requires the fee claimant to obtain a benefit from the party against whom the fee would be awarded. Therefore, the writ of certiorari should be denied.

II.

The Second Question Presented in the petition is not properly before this Court.

The petitioners have asked this Court to determine whether they "were prevailing

parties where the respondents allowed them to vote absentee in subsequent state elections without the necessity of further court order." (Pet., 3). However, the facts of record do not substantiate that the petitioners voted absentee as a result of this litigation in any state elections after the August, 1972, Democratic Party primary election which was the subject of the temporary restraining order entered in this case. The District Court did not make a finding that any subsequent absentee voting had been permitted by the respondents (Pet., 4a, 5a, 18a, 19a). Furthermore, the record does not reflect that the petitioner took exception to the findings of the District Court or that they sought to have the findings of the District Court amended with respect to subsequent

absentee voting by the petitioners in state elections.

There is a suggestion of subsequent absentee voting by the petitioners' attorney that a petitioner, Mr. Bly, held himself out as a "visiting scholar" and obtained an absentee ballot for elections not conducted by the respondents, specifically for the July 1974 Democratic Party primary and run-off election (Supplemental Appendix, 19, 51). Additionally, it is alleged in the respondents' Amended Answer that the petitioners were permitted to cast absentee ballots in the November 1972 General Election. However, the District Court made no finding whether Bly or any other petitioners actually did vote on these occasions or, if they did vote, pursuant to what authority they did vote. It should be noted that South Carolina election law had, even prior to the lawsuit permitted qualified students

to vote by absentee ballot.[3/] But the petitioners did not seek a finding of fact by the trial court that these suggested or alleged occasions of absentee voting were permitted as a consequence of this litigation or whether they were permitted under the absentee voting provision for students, or some other provision of law. Furthermore the petitioners have not shown that as a result of this litigation, either directly or indirectly, they were permitted on ony other particular subsequent occasion to vote by absentee ballot in a state election.

3/ Pursuant to South Carolina Act No. 977 of 1966 (1966 [54]2376) S.C. ACTS an absentee ballot was permitted to be sent to students who were registered to vote but who were residing outside the counties of their respective residences while enrolled in an institution of higher learning.

The Petitioner's Second Question is simply not properly presented for determination by this Court. It was not preserved in the trial court because the petitioners did not properly seek a finding that they did in fact vote in any subsequent elections nor did they rely on this theory in the Court below. Therefore the question is not properly before this Court. Tyrell v. District of Columbia, 243 U.S. 1, 61 L.Ed. 557 (1917); Phoenix Mutual Life Ins. Co. v. Raddin, 120 U.S. 183, 30 L.Ed. 644 (1887); see also Weade v. Dichmann, Wright & Pugh, 337 U.S. 801, 808, 93 L.Ed. 1704, 1708 (1949). For this reason the writ of certiorari should be denied.

III.

The decision below does not conflict with decisions of this Court allowing an

appellee to defend a judgment on any ground appearing in the record.

It is not disputed that "the appellee may...urge in support of a decree any matter appearing in the record." United States v. American Railway Express Company, 265 U.S. 425, 435, 68 L.Ed. 1087, 1093 (1924). In the instant case the appellees in the Court of Appeals "argue[d], for the first time, that they [were] the prevailing parties because ...they acted as a catalyst which caused or at least hastened the change of law which mooted their case." (Pet. 7a).

Although the petitioners urged that matter on appeal, the Court of Appeals rejected their argument for want of evidence in the record that the lawsuit had in fact acted as a catalyst. (Pet.

10a). It found that in the District Court the petitioners "failed to present any evidence on this point," or even to raise the argument. (Pet. 10a). The rule is well settled that a Court of Appeals has broad discretion in determining what questions it will take up and resolve for the first time on appeal. Singleton v. Wulff, 428 U.S. 109, 121, 49 L.Ed.2d 826, 837 (1976). The record clearly reveals that the petitioners did not seek to show, in the District Court, that they were a catalyst for the legislative change. Therefore the case should be treated in the posture and on the record on which the petitioners elected to rely in the District Court. Morrissey v. Brewer, 408 U.S. 471, 477, 33 L.Ed.2d 484, 492 (1972). Since the

record does not support the petitioner's contention that their lawsuit was a catalyst for the legislation which mooted their claim, the Court of Appeals did not err in rejecting their argument that they were the prevailing party.[4/]

The petitioners nevertheless urge that the "chronology of events" requires a finding that the petitioners caused the

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[4/] The state absentee voting law was revised in 1975 to extend the absentee ballot to broad categories of additional voters. Under the revised statute an absentee ballot could now be given to qualified voters who were absent from their residences on election day because of employment (including specifically government employment and professions of ministry, teaching, and medical), physical disability, death in the family, and vacation. § 7-15-320, Code of Laws of South Carolina, 1976. The petitioners happened to fall into one of those broad new categories and their claim was thus mooted.

subsequent legislative enactment. (Pet., 14, n.2., n.3.). In support of that argument, they cite several circuit court cases which suggest that "chronology of events" may be evidence of catalytic effect. But none of those cases raises the presumption of a catalytic effect from a given "chronology of events." Rather they regard the "chronology" as mere evidence.[5/] That is consistent with the

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5/ In International Society for Krishna Consciousness v. Anderson, 569 F.2d 1027 (8th Cir. 1978) the Court simply found that the plaintiff was the prevailing party, without stating any reasons to support that determination. Supra at 1029. The district court however had found that the defendant changed certain procedures which had mooted the plaintiff's claim. In the instant case there was no finding by the District Court that the respondents had taken action, voluntary or otherwise, to moot the petitioners' claim.

decision below in which the Court of Appeals expressly rejected the "chronology of events" evidence and the catalytic theory of the petitioners stating that "there is nothing in the record to indicate that the plaintiffs' efforts contributed to the amendment of the statute." (Pet. 112).

The petitioners were permitted in the Court of Appeals to defend the decree on any ground appearing in the record. However, the record did not permit the conclusion which the petitioners urged, and the Court of Appeals determined from the record that the District Court should be reversed. Therefore the writ of certiorari should be denied.

IV.

The decision below is consistent with

the legislative intent of the attorneys' fees award statutes at issue in this case.

The fee award statutes at issue in this case were enacted to compensate "private attorneys general" for their actions "to vindicate the fundamental rights here involved...." Sen.Rep. No. 94-1011, supra at 5; H.R. Rep. 94-196, supra at 40. In the instant case no rights of any sort were vindicated because the petitioners' claim was mooted by an intervening independent event. There was neither a voluntary settlement of the petitioners' claim, nor was there a judicial determination of that claim. (Pet. 7a, 15a). Since the petitioners vindicated no fundamental constitutional right as a result of this litigation, their claim for attorneys fees was

properly denied. Therefore the writ of certiorari should be denied.

V.

The questions presented by this case are not similar to those pending before this Court in another case in which certiorari has been granted.

The petitioners suggest that a similar issue is presented in Gagne v. Maher, 594 F.2d 336 (2d Cir. 1979) cert. granted ___U.S.___, 100 S.Ct. 44 (1979). In that case however, the plaintiffs prevailed in obtaining through a consent order some of the relief which they were seeking in the litigation. Supra at 338. In the instant case there was no finding that the petitioners obtained any relief as a consequence of the litigation. Rather they obtained

their relief from an intervening revision of the state election laws that was not a consequence of the lawsuit. (Pet., 11a). Since the case of Maher v. Gagne, supra, presents a dissimilar issue to that of the instant case, the writ of certiorari should be denied.

CONCLUSION

For these reasons the petition for a writ of certiorari should be denied.

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Robert S. Bly, et al., Plaintiffs, vs. Daniel R. McLeod, Attorney General of South Carolina, et al., Defendants.	CIVIL ACTION No. 72-988

ORDER

Upon motion of the plaintiffs and for good cause shown it is hereby ORDERED that:

The temporary restraining order prayed for be issued pursuant to Rule 65(b) of the Federal Rules of Civil

Procedure restraining and enjoining the defendant members of the Executive Committee of the Democratic Party of South Carolina from enforcing any order, opinion, directive or other publication, official or otherwise, in any manner which denies plaintiffs absentee ballots with which to vote in the August 29, 1972 Democratic primary election, and from refusing to issue such ballots to plaintiffs.

This order shall take effect at 5:00 P.M. on the 24th day of August, 1972, and by the terms hereof shall expire ten (10) days thereafter.*

AND IT IS SO ORDERED.

S/ ROBERT W. HEMPHILL
Robert W. Hemphill
U.S. District Judge

August 24, 1972
Columbia, S.C.

*All absentee ballots furnished pursuant to this order shall be kept separately and counted separately, from all other ballots and thereafter retained by appropriate party officials.